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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 253-256.

THE UNITED STATES OF AMERICA, ET AL., *Appellants*,

v.

THE PULLMAN COMPANY, ET AL., *Appellees*.

Appeals From the District Court of the United States for the Eastern District of Pennsylvania.

BRIEF FOR APPELLEE RAILROADS.

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March 3, 1947.

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BRIEF FOR APPELLEE RAILROADS.

OPINIONS BELOW.

The opinion of the specially constituted District Court in the original antitrust suit (R. 726) is reported in 50 F. Supp. 123. The opinion on the form of judgment (R. 759) is reported in 53 F. Supp. 908. The opinion sur judgment (R. 774) is reported in 55 F. Supp. 985. The opinion upon application for approval of sale of stock of the Pullman Company (R. 1193), the opinion supporting the order under review, is reported in 64 F. Supp. 108.

JURISDICTION.

The judgment of the District Court was entered on January 4, 1946 (R. 1203). Petitions for appeal were filed by the United States (R. 1206), Otis & Company (R. 1215), and Chesapeake & Ohio Railway Company, et al., (R. 1221) on March 4, 1946, and were allowed on the same day (R. 1209, 1216, 1220). A petition for appeal was filed by Glore, Forgan & Company on March 6, 1946 (R. 1226) and was allowed on the same day (R. 1227).

The jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. Sec. 29, and by Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 938, 28 U. S. C. Sec. 345. Probable jurisdiction was noted on October 14, 1946 (R. 2639).

SUPPLEMENTAL STATEMENT.

These are appeals by the United States and certain interveners in the court below from an order which approved the sale of the capital stock of the Pullman Company to the Railroad Buying Group as being a sale conforming to the terms of the court's final judgment dissolving the Pullman monopoly. The Railroad Buying Group, sometimes referred to herein as appellee railroads, intervened in the court below (R. 1170), appear here as appellees, and file this brief in support of the order of the court below.

A specially constituted District Court determined in an opinion dated April 20, 1943 (R. 726) that the ownership and control by Pullman Incorporated of both the Pullman Company, which operated a sleeping car business, and Pullman-Standard Car Manufacturing Company, which manufactured railroad cars, including sleeping cars, constituted a monopoly and involved restraints upon trade prohibited by Sections 1 and 2 of the Sherman Act. The final judgment, which was entered more than a year later, provided that Pullman Incorporated could elect which of the businesses it would dispose of and required it to submit for approval a plan to separate the business of manufacturing and the business of operating sleeping cars (R. 766).

Pullman Incorporated elected to dispose of the sleeping car business and filed a plan of separation which embodied a proposal of sale of its properties to the railroads (R. 775). A hearing held in respect to the plan resulted in the issuance on March 22, 1945, of an order permitting Pullman Incorporated "to treat with the railroads or any other persons" for the sale of either the sleeping car properties or the capital stock of Pullman Company (R. 958). The government filed with the court a written response to the plan of separation (R. 900-904). In that response, and at the hearing which preceded the order just mentioned, the government raised no objection to the proposed sale to the railroads, and it took no appeal from the order

(R. 1995, 2000, 2008).[1] Pursuant to this authority Pullman Incorporated offered the stock to the railroads in a letter dated May 12, 1945 (R. 2246), which offer was conditioned upon approval of the sale by the court and approval of Railroad purchase by the Interstate Commerce Commission (R. 2252).

Prior to the acceptance of this offer by the railroads, appellant Otis & Company (Case No. 254) in association with the so-called Young-Kirby group (R. 993) intervened and made an offer of purchase (R. 984), which was later supported by the Department of Justice (R. 2557, 2561). After the Otis & Company offer, came intervention (R. 1056) and offer to purchase by appellant Glore, Forgan & Company (Case No. 256) and intervention and offer to purchase by Standard Spring Steel Company (R. 1113), which last-named intervener is not an appellant here. Finally there was intervention and unqualified acceptance of Pullman's offer of May 12, 1945, by the Railroad Buying Group (R. 1176) which Pullman reported to the court as an executory contract of sale resulting from offer and acceptance (R. 1177). The Chesapeake & Ohio Railway Company, et al. (appellants in Case No. 255), which are controlled by the Young-Kirby group (R. 993), intervened in opposition to the railroads' proposal (R. 1178).

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[1] The following colloquy is illustrative of the government's attitude at that hearing:

"Judge Maris. Mr. Hamilton, is it your thought that Pullman, Inc., should have entered into an agreement or negotiated and secured a binding option or something of that sort and then come to us and say, 'We have a proposition under which we can sell our business to the American railroads for so many millions of dollars, on these terms, which have all been agreed upon,' and ask us to approve?"

• • • • • •

"Mr. Hamilton. What we would suggest, I think, would be something like this, that there would be a statement in this plan that they were prepared to sell the company, that they were prepared to sell it either by disposing of the stock or of the properties, that they were willing to deal with any purchaser that was responsible." (R. 1995).

After taking testimony (R. 2022-2403) and hearing argument (R. 2404-2631) the court held (R. 1193) that sale of Pullman Company stock to the Railroad Buying Group should be approved as a sale conforming to the terms of the final judgment of May 8, 1944, and on January 4, 1946, it entered the order now appealed from. That order approved the proposed sale, subject to the conditions that there should be no interlocking directorates between Pullman-Standard, Pullman Incorporated and the railroad vendees, and that Pullman and the railroad vendees should purchase new sleeping cars under competitive bidding (R. 1204). All the carefully drawn provisions of the final judgment of May 8, 1944, looking to elimination of the antitrust violations then found to exist in the sleeping car business,[2] were made applicable to the railroad purchasers (R. 1204).

The Administrative Phase of the Case.

Events have occurred since the appeals were taken in this case which have a profound bearing on the issues to be determined by this Court. Appellants have preserved a studied silence concerning these events, which are not even hinted at in their briefs. While it is true that they are not disclosed in the record, they are matters of public record of a character which this Court has frequently judicially noticed.[3]

Since the proposed operation of The Pullman Company under railroad ownership involves pooling of railroad revenues and service, appellee railroads filed with the Interstate Commerce Commission an application under Section 5(1) of the Interstate Commerce Act for approval of the

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[2] These conditions are summarized, *infra*, p. 30.

[3] In *Reconstruction Finance Corp.* v. *Denver & Rio Grande W. R. Co.*, decided June 10, 1946, 328 U. S. 495, 522, footnote 29, the Court quoted at length the contents of an application filed with the Interstate Commerce Commission over a month after submission of the case to the Court.

transaction herein proposed. The Department of Justice, the Chesapeake & Ohio group of railroads, and Otis & Co., all of whom are appellants in this case, intervened in opposition to the application. Extensive hearings were had before two Examiners of the Commission, covering a period of six days. The testimony comprised 572 transcript pages, and 110 exhibits were introduced. On January 29, 1946, the Examiners' proposed report was filed. In that report the issues are found in favor of the applicants therein, and the recommendation is made that the Commission grant the requested approval. The report is printed as an appendix to this brief. It contains a comprehensive statement of the proceeding before the Commission, and of the reasons for the Examiners' recommendations. Exceptions to the report have been filed by the interveners in the Commission proceeding, and it is expected that oral argument before the full Commission will take place shortly.

The effect of the Commission's action in the proceeding before it upon the issues involved in the appeals now before the Court, is discussed in the first point of the argument in this brief.

SUMMARY OF ARGUMENT.

I.

The only reasons urged by appellants for reversal of the order relate to matters within the administrative jurisdiction of the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act, and that jurisdiction has already been invoked. The contract of sale approved by the order below was conditioned upon Commission approval. In order to approve the pooling which results from the proposed transaction the Commission must find that the transaction does not unduly restrain competition and that it is in the interest of better service to the public or of economy in operation. If the Commission grants the approval it will thus have determined these issues in favor of appellee railroads. If the Commission withholds approval, then the order below becomes inoperative by its own terms since it approved a sale conditioned upon Commission approval. The order below should therefore be affirmed without consideration of the antitrust and public interest issues raised by the appellants.

II.

The railroad proposal is for a group of railroads consisting of nearly all the sleeping car using railroads in the United States to acquire and jointly operate the Pullman sleeping car business which furnishes facilities and services necessary for the passenger traffic of the railroads. No monopoly or restraint of trade results from such combined ownership and operation of the sleeping car service business. Every railroad will be free to own and operate its own sleeping car service business, in whole or in part, or to avail itself of the facilities of the jointly owned and operated Pullman Company. The operation of such a business is an integral part of the railroads' business and no violation of the antitrust law results from their control of such business.

III.

The order under review completely and effectually separates the business of manufacturing sleeping cars from the business of operating such cars. The railroad proposal will not create any monopoly in the manufacture or purchase of sleeping cars because there will be no relationship between the Pullman Company under railroad ownership and any manufacturer of sleeping cars, and every railroad will be wholly free to purchase sleeping cars for itself.

IV.

The alternative methods of operation of the sleeping car business proposed by the appellants who were unsucessful bidders for the Pullman stock are neither feasible nor lawful.

ARGUMENT.

I.

SINCE THE ONLY REASONS ASSIGNED BY APPELLANTS FOR REVERSAL OF THE ORDER UNDER REVIEW RAISE ISSUES WHICH WILL BE CONCLUSIVELY RESOLVED BY ADMINISTRATIVE PROCEEDNGS NOW PENDING, THE ORDER SHOULD BE AFFIRMED.

The court below, in carrying out its decree for dissolution of the Pullman monopoly, necessarily had jurisdiction to approve or disapprove the disposition which Pullman Incorporated made of its stock in The Pullman Company, in order to assure that the terms of its Final Judgment of May 8, 1944, in the antitrust proceeding (R. 764-774) were fully complied with by the sale and that the original defendants in that suit were purged of their law violations. It determined that "the railroads are the natural and obvious people to do sleeping car business" (R. 1195) and approved the sale to the Railroad Buying Group. Without such approval, railroad appellees of course could not become purchasers of the Pullman stock.

But even with that approval, the Buying Group could not lawfully operate the sleeping car business in the manner announced to the court below, because such operation involves a pooling of revenues and of service, requiring approval of the Interstate Commerce Commission under Section 5(1) of the Interstate Commerce Act. The court below recognized that this was true. In its final judgment of May 8, 1944, ordering dissolution of the Pullman monopoly and sale by Pullman Incorporated of its sleeping car business or of its car manufacturing business, it had foreseen the probability of a sale to a group of railroads under a plan for operation of the sleeping car business in a manner that would constitute a pooling of revenues or service requiring approval of the Interstate Commerce Commission.

Accordingly, that judgment provided:

> "Nothing in this judgment contained shall be construed as depriving the Interstate Commerce Commission of its jurisdiction over contracts between carriers under Section 5(1) or other provisions of the Interstate Commerce Act." (R. 772).

That judgment was made binding on appellee railroads by the terms of the order now under review (R. 1204).

The contract of purchase which that order approved was expressly conditioned upon authorization of the purchase by the Interstate Commerce Commission, as to the railroad purchasers, and by the District Court, as to Pullman Incorporated, the seller. Pullman Incorporated's offer of May 12, 1945, the unqualified acceptance of which by appellee railroads (R. 1185) created the contract approved by the court below, provided in paragraph 18:

> "It is recognized that any proposed purchase of Pullman stock by the Railroads will be subject to approval by the Interstate Commerce Commission of Railroad carrier action in that regard, and that any contract by Pullman Incorporated for the sale of its holdings of stock in The Pullman Company will be subject to approval by the Federal Court at Philadelphia." (R. 2252).

Thus the contract of the parties and the order of the court, as well as the statute, required the purchasing railroads to obtain approval of the transaction by the Interstate Commerce Commission. Appellee railroads therefore applied to the Commission for authority under Section 5(1) of the Interstate Commerce Act to carry out the proposed transaction. The Memorandum Agreement of October 18, 1945 (R. 1161-1169) as supplemented by the Supplemental Agreement of November 20, 1945 (R. 1182-1185), pursuant to which the appellee railroads propose to acquire and operate the sleeping car business, provides for a unified operation of the sleeping car business for the joint use and benefit of all railroads parties to those agreements, during a period ending not later than December 31, 1948. This unified

operation is to be brought about by means of two integrated and interdependent measures:

(1) Purchase and ownership by the railroads of the stock of Pullman, in stipulated proportions. (R. 1162-1163).

(2) Operation of the sleeping car business pursuant to uniform operating contracts and leases between Pullman and individual railroads. (R. 1166).

The application filed by the members of the Buying Group with the Interstate Commerce Commission seeks the Commission's approval of the pooling of revenues and service which will result from this transaction.

1. The Commission's Jurisdiction of the Application Under Section 5(1) of the Interstate Commerce Act.

Section 5, paragraph (1) of the Interstate Commerce Act, so far as here material, provides as follows:

> "Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided*, That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved,

such pooling or division, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: * * *"

The reasons the railroad proposals for operation of the sleeping car business will result in a pooling within the meaning of the foregoing statute are concisely stated in the Examiners' proposed report (Appendix, *infra*, pp. 8-11) to which we invite the Court's especial attention.

The very nature of the transaction proposed by the appellee railroads discloses a pooling. A large group of railroads, consisting of nearly all the railroads of the United States which furnish sleeping car service, propose joint ownership and unified operation of this important segment of the railroad transportation business, which necessarily involves a substantial measure of pooling of expenses and operations (R. 1165-1166), thus producing a pooling of net revenues and of service within the meaning of Section 5(1) of the Interstate Commerce Act.

The Interstate Commerce Commission long ago held that the unified operation of a part of the railroad business by a large group of railroads constitutes a pooling of such business within the meaning of Section 5(1). *Express Contract, 1920*, 59 I. C. C. 518. In that case the Commission declared that a pooling between railroads exists whenever the revenues from any part of their business are divided among them "otherwise than according to individual performance." This ruling was followed in *Securities and Acquisition of Control of Railway Express Agency*, 150 I. C. C. 423, and *Railway Express Agency Pooling Application*, 227 I. C. C. 517. "The statute, with the meaning thus settled, has been reenacted by Congress.[4] The construction should be followed until Congress sees fit to change it." *Fondren* v. *Commissioner*, 324 U. S. 18, 29, 30. Since the reenactment

[4] Transportation Act, 1940, 54 Stat. 905.

of Section 5(1) the Commission has reiterated its previous rulings on this point. *Pooling of Refrigeration Earnings*, 258 I. C. C. 24.

2. The Issues Pending Before the Interstate Commerce Commission Are Identical With Those Raised by These Appeals.

The assignments of error and arguments upon which appellants rely for reversal of the order under review, while voluminous, resolve ultimately into two propositions, namely:

1. That the acquisition and operation of Pullman's sleeping car business by appellee railroads would result in a restraint of competition and monopoly violative of the antitrust law.

Typical of the assignments raising this point are the following, in the government's appeal, No. 253:

> "4. The Court erred in holding that the business of furnishing sleeping-car service, which is the duty of each individual railroad, could lawfully be monopolized by a combination of railroads generating on their lines approximately 98 percent of the sleeping car business in the United States." (R. 1207).
>
> "5. The Court erred in approving an offer that eliminated all competition in the operation and servicing of sleeping cars." (R. 1207).

2. That the court should have considered which of the proposals for purchase of the sleeping car business would result in the best method of conducting the sleeping car business for the benefit of the public at large.

Illustrative of the assignments raising this point is the government's assignment 11:

> "11. The Court erred in holding that in approving the sale of The Pullman Company to a combination of

> railroads generating on their lines approximately 98 percent of the sleeping-car business in the United States it should not consider and determine the best way to conduct the sleeping-car business for the benefit of the public at large." (R. 1208).

The same point is made in the eleventh assignment of error of appellant Otis & Co. (in No. 254) and of appellants Chesapeake & Ohio Railway Co., et al. (in No. 255):

> "11. The Court erred in holding that in approving the sale of The Pullman Company it should not consider and determine 'the best way to conduct the sleeping car business for the benefit of the country at large.'" (R. 1217, 1223).

These are the very issues now pending for decision by the Interstate Commerce Commission in the proceeding under Section 5(1) of the Interstate Commerce Act. That statute requires the Commission to find, before granting such an application, that the transaction will be

> "in the interest of better service to the public or of economy in operation,"

and that it

> "will not unduly restrain competition."

The Commission's Examiners, who conducted its hearing and heard the evidence on these issues, have recommended in their proposed report that the Commission find that:

> "The proposed pooling will be in the interest of better service to the public and of economy in operation."
>
> "The proposed pooling will not restrain competition." (Appendix, *infra*, pp. 37-38).

The reasons for these recommendations and the evidence on which they are based are clearly stated in the proposed report (Appendix, *infra*, pp. 17-37). It will at once be apparent that appellants are asking this Court to decide ad-

ministrative questions which Congress has entrusted to the Commission, upon which the Commission has concluded hearings, and upon which the Commission's decision is imminent.

3. The Interstate Commerce Commission Has Primary Jurisdiction of the Issues Involved in These Appeals.

This Court has recently pointed out in unmistakable language the relation between the courts and the Commission in passing on questions arising under Section 5 of the Interstate Commerce Act. In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87, it said:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission', not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.'"

That case dealt with a proceeding under paragraph (2) of Section 5, but manifestly the same considerations apply under paragraph (1) of that section.

Appellant Otis & Co. in its brief (pp. 32-33) argues that the proceeding in the court below was analogous to a proceeding under Section 11(b) of the Holding Company Act of 1935 (49 Stat. 803, 15 U. S. C. §79 *et seq.*). Speaking of

the relative functions of the courts and the Securities and Exchange Commission in such a proceeding, Otis & Co. says:

> "In its decision the court is required to follow the recommendations of the S.E.C. if they have support in the record. The reasons for this are quite obvious. The S.E.C. is an expert body, familiar with trade practices in its field, without an interest of its own to serve, and with an obligation to give effect to public policy. It has opportunities to make extensive investigations on which to ground its decisions, it has acquired a wealth of experience in dealing with varied and unlike situations. It possesses not only facts, but an understanding of affairs in action upon which the courts can rely. It alone, among all parties concerned with or participating in a proceeding can give intelligent representation to the public interest."

It will be observed that the foregoing is an apt description of the character and function of the Interstate Commerce Commission in a case, like this one, which involves unified operation of a railroad transportation agency. Otis & Co., however, takes the extraordinary position that the Department of Justice in this proceeding occupies the status just described, and actually assigns as reversible error the failure of the court to give weight to the Department's recommendation (Otis brief, pp. 32-34). The Department of Justice is a prosecuting agency, not a quasi-judicial tribunal. In matters involving pooling among carriers Congress has designated the Interstate Commerce Commission—not the Department of Justice—as the "expert body, familiar with trade practices in its field, without an interest of its own to serve, and with an obligation to give effect to public policy."

Early in this case the Department of Justice itself realized, and urged upon the court below, the necessity for guidance by some expert administrative body in the complex situation presented by the unscrambling of the Pullman monopoly. In its original opinion in the antitrust case the court below said:

> "Counsel for the plaintiff have repeatedly suggested that in case of a finding of violation, the questions concerning relief might be referred to a master or one of the regulatory commissions to hold hearings at which experts, governmental or private, could state their views regarding proper organization of the business of passenger transportation in the United States." (R. 743; 50 Fed. Supp. at p. 136).

At that stage the question of purchase by the railroads and of a pooling of the sleeping car business had not yet arisen, so the court rejected the government's suggestion. But later when that question became a probability, as we have seen, the court was careful to preserve the Interstate Commerce Commission's jurisdiction with respect to it. (R. 772).

The broad reach of the Commission's jurisdiction under Section 5 of the Interstate Commerce Act is brought into sharp relief by *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508; *United States* v. *Southern Pacific Co.*, 290 Fed. 443 (D. C., Utah). In that proceeding the Commission approved and authorized under Section 5 an acquisition of control that had already been held by this court[5] to be in violation of the Sherman Act, and the District Court modified the judgment in the antitrust case accordingly, from which the Government did not appeal. Such action by the Commission was not an invasion of the courts' jurisdiction, for the reason stated by the Commission as follows:

> "When by our order based upon broad considerations of the public interest we in effect grant relief against antitrust laws, and other restraints and prohibitions by law, we are exercising a power which the statute gives to us alone." (76 I. C. C. at p. 516).

In cases under Section 5 of the Interstate Commerce Act, as in reorganization cases under Section 77 of the Bankruptcy Act, "The judicial process • • • is, as it were,

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[5] *United States* v. *Southern Pacific Co.*, 259 U. S. 214.

brigaded with the administrative process of the Commission," and "the authority of the court is intertwined with that of the Commission." *Palmer* v. *Massachusetts*, 308 U. S. 79, 87.

The situation here is in some respects similar to two cases decided by this Court at the last term, *Smith* v. *Hoboken Railroad, etc., Co.*, 328 U. S. 123, and *Thompson* v. *The Texas-Mexican Ry. Co.*, 328 U. S. 134. They involved efforts to terminate by court action leases and trackage rights of railroads undergoing reorganization under Section 77 of the Bankruptcy Act. In both cases it was held that proposed abandonment of operation by the debtor road and the effect on the debtor's reorganization plan presented "problems primarily for consideration and decision by the Interstate Commerce Commission." (328 U. S. at p. 129).

Like considerations govern the present case. Pullman Incorporated has contracted to sell its Pullman stock to appellee railroads. Insofar as concerns compliance by Pullman Incorporated with the final judgment in the anti-trust case, that sale is subject to approval of the courts. Insofar as concerns the effect of the acquisition and operation by appellee railroads of the sleeping car business in the manner proposed, the sale is also subject to the approval of the Commission under Section 5(1) of the Interstate Commerce Act. The determination of whether such pooled operation will be in the public interest and will not unduly restrain competition is a matter solely within the administrative jurisdiction of the Commission. It involves important questions affecting passenger transportation by railroad with which the Commission is uniquely fitted to deal. The Commission is now considering these questions after full presentation of evidence bearing thereon. At this stage no public or private purpose is to be served by judicial consideration of the same questions in advance of the Commission's determination.

4. The Action of the Interstate Commerce Commission on the Pending Application Under Section 5(1) of the Interstate Commerce Act Will be Determinative of the Issues in These Appeals.

If the Commission grants the authority sought in the proceeding now pending before it, all grounds here urged for reversal of the order under review will have vanished. There will then be an administrative determination—binding and conclusive unless set aside by the courts in a direct attack on the order[6]—that the pooled operation of the sleeping car business by appellee railroads in the manner proposed will be in the interest of better service to the public and will not unduly restrain competition. The transaction will then be "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law" by virtue of the express provisions of paragraph (11) of Section 5.

On the other hand, if the final order of the Commission in the pooling proceeding is adverse to appellee railroads, they will be disabled from availing themselves of the permission which the court granted Pullman Incorporated to sell them the stock. Moreover, the Commission's denial of the application will have caused the court's permission to lapse automatically, since that permission was for a sale subject to the approval of the Commission. In that event the District Court will necessarily have to make some other and different arrangements to execute its final judgment in the antitrust case.

Since the administrative determination will resolve the issues tendered by these appeals, what should be the form of the judgment to be rendered by this Court?

In some of the cases in which this Court has held that administrative determination of issues was a prerequisite to final decision of a cause, it has vacated the lower court's

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[6] *Central New England R. Co.* v. *Boston & Albany R. Co.*, 279 U. S. 415, 420; *Thompson* v. *Texas-Mexican Ry. Co.*, 328 U. S. 134, 151 footnote 11.

decree and directed it to stay its hand pending administrative determination of such issues. Such was the action of the Court in *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422, where it was said:

> "When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but, as in *Mitchell Coal Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, the cause should be held pending the conclusion of an appropriate administrative proceeding." (p. 433).

Similarly, in *Thompson* v. *The Texas-Mexican Ry. Co.*, 328 U. S. 134, 151, the court said:

> "Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature."

These decisions conclusively define the functions of the Commission. However, the procedural sequence there prescribed as appropriate would be inappropriate for this case in the light of the circumstances here presented. In those cases the lower court had entered a judgment that of itself and without more finally determined the rights of the parties, such as a judgment for money damages or a judgment cancelling a lease or a trackage contract. Unless reversed, such a judgment would constitute a bar to compliance with whatever order might subsequently be entered by the administrative agency. By itself such a judgment would have concluded the parties and foreclosed administrative determination of the administrative issues in the case.

The order here under review has no such effect. It merely gives the consent or permission of the court administering the antitrust proceeding to the sale by Pullman Incorporated to appellee railroads of The Pullman Company stock, which sale consisted of railroad acceptance of Pullman Incorporated's offer conditioned upon approval by the Interstate Commerce Commission. The court's approval is permissive, not mandatory. It does not purport to, nor can it, relieve appellee railroads from the necessity of securing approval of the Interstate Commerce Commission under the applicable statute. Indeed, in its earlier and basic judgment of May 8, 1944, which by the terms of the order under review is binding on appellee railroads (R. 1204, par. 3) the District Court expressly recognized and deferred to the Commission's jurisdiction "over contracts between carriers under Section 5(1)" of the Interstate Commerce Act. (R. 772).

This situation is one in which a transaction required both judicial and administrative approval. Necessarily, as will presently appear, judicial approval was procured first, but subject to subsequent administrative authorization. A closely analogous situation exists in the sale of receiver's or trustee's certificates of railroads undergoing reorganization in equity receivership or under Section 77 of the Bankruptcy Act. There the court having jurisdiction of the reorganization proceeding must approve the issue and sale of the certificates as must also the Commission under Section 20a of the Interstate Commerce Act. It is a customary and long-followed procedure for the trustee or receiver to obtain first an order from his court, authorizing him to issue and sell the certificates, and to apply thereafter to the Commission for its authority. *Certificates of Paris & Mt. Pleasant Ry. Co.*, 65 I. C. C. 153; *Minneapolis & St. Louis Receiver's Certificates*, 99 I. C. C. 224; *Minarets & Western*

Ry. Co. Trustee's Certificates, 193 I. C. C. 289.[7] This method of procedure has long been followed without challenge, and it has never been suggested that the court orders authorizing issuance of the certificates were improper or subject to reversal because they preceded rather than followed the Commission's orders giving administrative approval to such issuance and sale.

In the practical situation that existed, no other course than the one here pursued could have been followed. Until an order approving the purchase had been entered, no one was in a position to present the matter to the Commission. Until that time, it could not be known what conditions the court would attach to its order, which conditions might materially affect the terms of the proposed pooling arrangement. Until that time, in short, appellee railroads had no concrete proposal to submit for administrative approval. Hence the only practicable way to proceed was to obtain court approval, subject to subsequent approval by the Commission, and this was done. Therefore, affirmance of that order will not infringe or impair the Commission's jurisdiction.

In those cases where this Court has required judgments to await the outcome of administrative action, no proceeding was pending before the administrative agency; the parties had sought to try out their rights finally and conclusively in the courts, and the lower courts had given judgments that purported finally to adjudge such rights, ignoring administrative jurisdiction. This Court has said that such a judgment "would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted." *Thompson* v. *The Texas-Mexican Ry. Co.*, 328 U. S. 134, 144.

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[7] For an example of such an order, see Order No. 63A, Seaboard Air Line Ry. Co. Receivership Record, V, 3619-3686. Issuance of the certificates was thereafter authorized by the Commission in *Seaboard Air Line Ry. Co. Receivers' Certificates*, 180 I. C. C. 615.

Such is not the case here. No judgment has been entered which binds or embarrasses the Commission. Neither the parties nor the court below have ignored the Commission, but all have recognized its independent jurisdiction. Its jurisdiction has actually been invoked as contemplated by the court below and as required by the contract of sale itself, and the matter is ripe for final determination by the Commission.

This case involves the future ownership and management of an important part of the nation's transportation service. Until the end of this dispute the future of the sleeping car business is uncertain and unsettled, with consequent risk of impairment of service to the public. It is plainly in the public interest that this controversy be ended at the earliest possible moment. The urgent necessity is clearly stated in the Examiners' proposed report (Appendix, *infra*, pp. 16-17).

This court has statutory power to "direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require." 28 U. S. C. §876. The only reasons assigned by appellants for reversal of the order raise issues which will be conclusively resolved one way or the other by the administrative action of the Interstate Commerce Commission, which is imminent. The order under review does not impinge on the Commission's jurisdiction or conflict with whatever action it may take in the administrative proceeding. Affirmance of the order will leave the case in such posture that it may be expeditiously disposed of with fairness to all interests involved, as soon as the administrative questions are determined. Affirmance is therefore the action which the justice of the case requires.

II.

SALE TO THE RAILROADS WILL NOT RESULT IN ANY RESTRAINT OF COMPETITION IN THE OPERATION OF THE SLEEPING CAR BUSINESS.

Even if, notwithstanding what has been urged under our first point, the issues raised by appellants are considered on the merits, they should be determined in favor of appellees.

The operation and servicing of sleeping cars is primarily the business of the railroads, and they have a public duty to furnish such cars. *Pennsylvania Co.* v. *Roy*, 102 U. S. 451, 457; *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.*, 139 U. S. 79, 89. In the case last cited, the Court said:

> "* * * The defendant was under a duty, arising from the public nature of its employment, to furnish for the use of passengers on its lines such accommodations as were reasonably required by the existing conditions of passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own drawing-room and sleeping cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. * * *"

Where a railroad chooses to perform any part of its public duty of carriage by an agent or concessionaire, the railroad has the right to choose the agent. As was said in the *Express Cases*, 117 U. S. 1, 24:

> "* * * The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security."

And in *Use of Privately Owned Refrigerator Cars*, 201 I. C. C. 323, 373, the Interstate Commerce Commission said:

> "A private-car owner, whether he be a shipper or not, has no right to have his cars used as a vehicle for the transportation of freight over the rails of any carrier without its consent. * * *"

We do not understand that any appellant questions the right of each railroad to perform its own individual sleeping car service. As stated by the court below in its opinion (R. 1196):

> "One railroad furnishing sleeping cars to the passengers on its lines is certainly not a situation which anyone could see as a possible source of Sherman Act violation. That was granted, we think, in all the arguments made to us."

Appellants close their eyes to the nature of the sleeping car business as an essential part of railroad passenger transportation. Instead, they treat it as a separate business which anyone should have the right to enter and engage in on the properties of the railroads. From this false premise appellants argue that the railroads may not lawfully perform this part of their business through a joint agent or instrumentality because to do so would be to exclude others from performing like service.

But it has long been recognized that where special services or facilities are necessary or convenient adjuncts to a particular class or type of traffic, such special services or facilities may lawfully be furnished by a jointly owned and operated agent or instrumentality of the railroads.

Thus, in *United States* v. *Terminal Railroad Association*, 224 U. S. 383, a group of railroads had acquired control of all terminal facilities in the city of St. Louis, under a contract which provided that no other railroad could be admitted to ownership or use of the terminal facilities except with unanimous consent of the owning group. The government contended that the mere existence of such a combined

ownership and operation of terminal facilities constituted a restraint of trade violative of the Sherman Act, just as would the combination of parallel and competing railroad systems. Rejecting this contention, the Court said:

> "We are not unmindful of the essential difference between terminal systems properly so described and railroad transportation companies. The first are but instrumentalities which assist the latter in the transfer of traffic between different lines, and in the collection and distribution of traffic. They are a modern evolution in the doing of railroad business, and are of the greatest public utility. They, under proper conditions, do not restrain, but promote commerce." (pp. 401-402).

Here appellants charge that joint control of a company which furnishes facilities necessary to a branch of the railroad passenger business, is violative of the Sherman Act, just as would be a combination of the passenger traffic itself. But here, as in the *Terminal case*, the jointly-owned company is but an instrumentality which assists the railroads in the handling of their own, separate, competing traffic.

In the *Terminal case*, it was held that the contract provision limiting the ownership and use of the terminal facilities was in restraint of trade, and the Court laid down as conditions to the legality of the combination that the terminal be open to all railroads to become joint owners, and that it be open to joint use by all, whether owners or not, on just, reasonable, and non-discriminatory terms. Upon its compliance with these terms, the Court held that the Terminal Association was no longer in violation of the Sherman Act. *United States* v. *Terminal Railroad Association*, 236 U. S. 194.

It will be observed that the conditions imposed by the Court in the foregoing case, are already met by the transaction now before the Court. The Memorandum Agreement constituting the Buying Group expressly provided that any railroad or receiver or trustee of a railroad could become a member of that Group by adhering to the agreement (R.

1162). The agreement further provides that Pullman in railroad ownership will furnish cars and service to any railroad desiring it, whether or not a member of the Buying Group, on equal and non-discriminatory terms (R. 1166). As a matter of fact, nearly all American railroads furnishing sleeping car service have become members of the Buying Group and are now appellees before this Court (see note 10, p. 36, *infra*).

It has for many years been a practice for groups of railroads jointly to own and operate companies which furnish special facilities and service required for particular classes of traffic. No one has ever supposed or charged that such joint ownership and operation of a service facility constitutes a violation of the Sherman Act. Since 1929 the express business has been conducted by a company jointly owned by virtually all railroads. *Securities and Acquisition of Control of Railway Express Agency*, 150 I. C. C. 423; *Railway Express Agency Pooling Application*, 227 I. C. C. 517. In those cases the Interstate Commerce Commission approved the pooling involved in the joint operation of the express business of the railroads, but no suggestion was made before the Commission or elsewhere that such an arrangement is restrictive of competition or violative of the Sherman Act, because nobody engages in the express business except the Railway Express Agency.

A group of 19 railroads in the east and southeast own the stock of Fruit Growers' Express Co., which owns and maintains a fleet of refrigerator cars and furnishes refrigeration service in connection therewith. The cars are used on the lines of the owning railroads and about 18 other railroads with which the Fruit Growers' Express Co. has contracts to supply cars and services. In *Pooling of Refrigeration Earnings*, 258 I. C. C. 24, the Commission authorized the pooling of revenues from the refrigeration services performed by this jointly owned facility of the railroads. While the Department of Justice has frequently intervened before the Commission to oppose applications by carriers which

it deemed likely to result in restraints of trade,[8] it did not intervene in that case. Nor did any one else suggest that any restraint of competition resulted from such joint ownership and operation by a group of railroads, many of them competitors, of a facility useful in handling a particular class of traffic.

The Union Pacific and the Southern Pacific, which are competitors (*United States* v. *Union Pacific R. Co.*, 226 U. S. 61) jointly own the Pacific Fruit Express, which furnishes the refrigerator cars in which the perishable traffic of those railroads is carried (R. 2198-2199). No one has ever charged that this joint control by competing railroads of a service facility results in a violation of the antitrust laws.

In all these situations—terminals, express traffic, refrigerator service—the railroads have been permitted jointly to own and operate companies which furnish special facilities and services for some portion of their business. The business of Pullman is exactly analogous. It furnishes special cars and services necessary for overnight passenger traffic. Railroads will compete for sleeping car passengers as before, because it will remain to the economic interest of each railroad to carry as many passengers over its own line as possible, just as in the illustrations given above the railroads still compete for freight traffic. The fact that they furnish the special facilities and services for such traffic more economically and satisfactorily by employing a jointly owned agent or instrumentality rather than each doing so for himself, does not create any violation of the antitrust laws.

The effect of the final judgment of May 8, 1944, which dissolved the Pullman monopoly, was to give every railroad a continuing election to operate its own sleeping cars or seek the assistance, in whole or in part, of an outside agency (R. 770-771). The railroads constituted the market that

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[8] *E.g., Associated Transport, Inc.—Control and Consolidation*, 38 M. C. C. 137; *Allied Van Lines—Pooling*, 39 M. C. C. 287.

was to be freed, and the numerous and elaborate provisions of the judgment effectively struck from the railroads the shackles of the Pullman monopoly (R. 1195). The Government was satisfied with the terms of the judgment and acquiesced in it by not appealing from it. By such acquiescence the Government expressed its willingness that the Pullman Company under its original management, divorced only from Pullman-Standard, could continue to operate the Pullman business of the nation under the terms of the judgment. This necessarily follows because paragraph 9 of the judgment permitted Pullman Incorporated to dispose of the manufacturing business and retain the sleeping car business (R. 766). The Government had insisted that Pullman Incorporated retain the sleeping car business (R. 759).

The Government now says (page 21 of its brief) that had the court approved sale to an independent bidder "the adequacy of its judgment would not be subject to attack under the Sherman Act". Only when sale to the railroads was proposed did the Government take the position that the terms of the original judgment were ineffectual, even when supplemented by the additional conditions imposed by the court in its order approving the sale (R. 2549).

The various objections to acquisition of the stock by the railroads made by the Government and by the unsuccessful bidders in the court below were considered by the court at the hearing (R. 2022-2403) and argument (R. 2404-2631) that preceded approval of sale to the railroads. The court met these objections in the order appealed from by providing:

> (1) That interlocking directorates between the railroad vendees and Pullman Incorporated and Pullman-Standard were prohibited;
>
> (2) That new sleeping cars purchased by either Pullman or any of the railroad vendees should be through competitive bidding under the Clayton Act;

(3) That after the consummation of the sale "Pullman Company and any person or corporation to whom the vendee railroads may hereafter sell Pullman Company's stock or assets shall continue to be bound until further order of the Court by all the provisions of the decree of this Court made May 8, 1944." (R. 1204)

The railroads were not parties to the original proceeding, but as purchasers of the stock of Pullman Company they became subject to the judgment of May 8, 1944. In that judgment the court gave effect to the determination, announced in its opinion of the year before (R. 726), that there should be a complete and perpetual separation of the sleeping car business and the sleeping car manufacturing business. Stringent restrictions were imposed upon all parties then before the court. Notable among the restrictions are those contained in paragraphs 12 to 15 forbidding ownership or control of the stocks, bonds, or securities of one of the Pullman enterprises by officers, directors, agents or employees of the other (R. 767); those contained in paragraphs 17 to 20 forbidding exclusive dealing arrangements between the Pullman Company and Pullman-Standard, abrogating existing contracts for the construction of cars and providing for competitive bidding on all new cars to be acquired by Pullman (R. 768); and those contained in paragraphs 21 to 25, giving the railroads having contracts with Pullman the right to purchase sleeping cars used on their lines, requiring Pullman to serve railroad owned cars operating on any railroad or any part thereof on non-discriminatory terms, and requiring that through-line operations be continued (R. 769-771).

The court below met the argument about perpetuation of monopoly through a sale of Pullman stock to the railroads by saying:

"We see no danger of the perpetuation of monopoly in a railroad owned sleeping car business. Here we must look rather closely at our concept of what consti-

tutes an unlawful monopoly in this connection. The thing which got The Pullman Company into trouble was not that it was the only company furnishing sleeping car service, but that Pullman made it virtually impossible for anybody else to get into the business. This applied not only to a competing concessionaire, but even to a railroad which sought to run part of its own sleeping car service and let Pullman do the rest. We think we have got rid of all that by the careful limitations imposed upon Pullman Company by the original judgment in this case, and which will be imposed upon its successors by the order which we shall enter. A railroad may join with others and use exclusively the services of Pullman. It may do part of that service itself, or through some other concern of its own choosing, and ask Pullman to do the rest. It may own all of its own sleeping cars, or part of them, or none of them. All of this is provided for in our judgment. There is, then, no strangle hold on the sleeping car business by a railroad owned Pullman Company or anyone else. Therefore there is no unlawful monopoly." (R. 1197-8)

Notwithstanding that the elaborate provisions of the original judgment as well as the additional provisions in the order under review became binding upon the railroads as purchasers of Pullman stock, the Government still contends on this appeal that under railroad operation there would be a continuation of the Pullman monopoly. The Government's main contentions in this respect will now be dealt with.

1. The Government's Contention That Ownership of Pullman by the Railroads Will Cause All of Them to Use Its Service in Like Manner as the Former Exclusive Operating Contracts Caused the Railroads to Use the Services of the Old Company is Wholly Unfounded.

It may well be that most if not all of the railroads will prefer to use the services of Pullman under railroad ownership because they will find it more economical and satisfactory, but that is a very different thing from saying that they must of necessity use the services because of any compul-

sion such as existed in the old Pullman setup. Merely because they may prefer to perform this part of their passenger business—sleeping car service—through the assistance of their own agency rather than through a postulated agency of a third party does not condemn the railroad plan; rather, it commends it.

The argument of the Department of Justice on this feature of the case is based on a fundamental fallacy. That fallacy consists in the tacit assumption that by operating their own sleeping car service the railroads would be unlawfully excluding from the sleeping car business those who might otherwise engage in it. Nobody can engage in the sleeping car business except by license from each of the railroads over whose lines the service is to be operated. There is no such thing as a sleeping car business existing independently of passenger transportation or without the consent of the railroads. A railroad has the right to exclude concessionaires from its own property. No outsider has the right to say to any railroad, "You may not perform this service because I want to do it for you." Appellants assume that some outsider is entitled to say this very thing to the railroads, individually and as a group. That assumption vitiates their entire argument.

The arrangements made by the railroads for operating the sleeping car business must be viewed in the light of the restrictions imposed upon Pullman by the court in its final judgment and made applicable to the railroads by the terms of the order under review. The judgment requires that Pullman at the request of any railroad shall offer upon reasonable and non-discriminatory terms:

> "* * * to service, and, * * * shall service any sleeping car owned by such railroad while it is on the lines of such railroad and on any of the through lines in which such railroad participates, * * *." (R. 770, Par. 22)

"* * * to service, or furnish and service, * * * sleeping cars on any line of any railroad * * * to the extent that cars are available, even though sleeping cars are about to be or are being furnished, serviced, or furnished and serviced, on other lines of the same railroad by the railroad itself or by some third party." (R. 770, Par. 23)

"* * * to furnish and service * * * cars from the pool of sleeping cars owned and operated by Pullman, to the extent that cars are available, for the purpose of meeting all or a part of the peak or seasonal demands for sleeping car accommodations on the lines of such railroad, irrespective of whether or not such railroad has a contract or agreement with Pullman whereby Pullman is to furnish, service, or furnish and service, sleeping cars to meet all or a part of the normal requirements of such railroad." (R. 770, Par. 24)

In addition the railroads have undertaken in the Memorandum Agreement which was submitted to the court as a part of the railroad proposal to purchase:

"1. To maintain without interruption orderly sleeping car service requisite in the interest of the public and for the military establishment in the existing emergency.

"2. To afford means whereby every Railroad, subject to the terms of this Memorandum Agreement, may:

"(a) acquire all or any part of the sleeping cars regularly assigned to its lines;

"(b) conduct its own sleeping car operation, in whole or in part, or arrange, through contract, on reasonable and non-discriminatory terms, for the conduct thereof by others;

"(c) perform its own service or maintenance, or service and maintenance, of sleeping cars used in operations on its lines;

"(d) procure such service or maintenance, or service and maintenance, through contract on reasonable and non-discriminatory terms with The Pullman Com-

pany under railroad ownership or with a service company constituted as hereinafter set forth." (R. 1163-4)

The railroads are thus bound by the judgment of the court and by their own contract to offer reasonable, non-discriminatory contracts and services to all railroads. Each railroad will be free to use the service of the commonly owned company, to operate its own service or to contract with others for such service in whole or in part. Each railroad will still have full incentive to obtain for itself all the sleeping car traffic it can handle.

The railroad proposal will in no way restrain competition; on the contrary, it will preserve and foster competition more fully than any other method of operating the sleeping car business that has been suggested.

2. The Government's Contention That Railroad Operation of Pullman Will Create a Monopoly and Restrain Competition Because as Stockholders, Creditors and Customers of Pullman They will be Likely to Use the New Company Rather Than Any Outside Agency is Unsound.

That the railroads will be the stockholders of the Pullman Company and its creditors and customers, and therefore likely to use its services, in no wise means that the railroad plan of operating the sleeping car business creates a monopoly or restrains competition. *United States* v. *Terminal Railroad Ass'n*, 224 U. S. 383; 236 U. S. 194.

Such a situation does not create a monopoly or restrain competition because it will be brought about by the free choice of the railroads; the way is open under the judgment of the court and the agreement of the parties for any railroad to withdraw from its association with the others and perform the service itself, in whole or in part, or hire someone else to perform it. There can be no monopoly or restraint on competition when the parties retain their freedom to make other arrangements.

In making this argument the Government completely ignores the basic consideration that sleeping car service is an integral part of passenger transportation and that there is a direct obligation on the railroads, not some outsider, to furnish it. The rendition of sleeping car service by outsiders has been termed an historical accident by a well known writer[9] on interstate commerce law, arising out of the possession of the basic patents by private individuals in the first instance. Under the court's judgment the way is now open for the railroads themselves to perform the sleeping car business under restraints and conditions that will prevent a new monopoly from arising. As the court below said:

> "The railroads are the natural and obvious people to do sleeping car business. They are the ones who own the rails on which the cars are drawn; it is their locomotives which pull sleeping cars as well as coaches and freight cars. It is the railroads' obligation to furnish the sleeping car service. This we think to be a point of highest importance in this connection. 'Pullman service is like a public utility,' we have been told. 'Would you allow a public utility to be run by its chief customers?' The analogy is almost completely inaccurate. Sleeping car service, like dining car service, is part of the essential business of carriage of passengers in a country where distances between points are as they are in the United States. The carrier is obligated to furnish the service or see that it is provided." (R. 1195-6)

In carrying out their obligation to provide the service, or see that it is provided, there is every reason of policy and economy for the railroads to set up their own agency to perform the service, just as they have done for the performance of express service. *Railway Express Agency Pooling Application*, 227 I. C. C. 517.

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[9] Sharfman, *The Interstate Commerce Commission*, (1931) II, 58.

As stockholders, creditors and customers of the Pullman Company the railroads will, of course, have an interest in the Pullman Company and that interest should make them require the Pullman Company to render satisfactory service. If it does not, then any railroad can withdraw at will.

3. The Government's Contention That Under the Railroad Plan Six Large Railroads Will Own a Majority of Pullman Company Stock and Thus Have Power to Discriminate Against Other Railroads is Without Foundation.

Only the railroads in the Chesapeake & Ohio group are expressing concern about the position of the smaller sleeping car roads. The fact that the Chesapeake & Ohio System is controlled by the Young-Kirby group (R. 993) may be significant in this connection. The remainder of the railroads doing a sleeping car business, without exception, have approved the plan of the Buying Group and practically all of them are participants in the Buying Group.[10]

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[10] All United States railroads over whose lines sleeping car service is rendered are joined in the Buying Group of Railroads, excepting only:

(1) Chesapeake & Ohio and affiliated lines which render approximately 1.34 percent of the sleeping car business of the country; but even these railroads have reserved their right to join the Buying Group if the Buying Group acquires the Pullman Company (*infra*, Appendix, p. 2);

(2) Central Railroad of New Jersey, Chicago & Eastern Illinois Railroad, St. Louis Southwestern Railway, Tennessee Central Railway and Detroit & Mackinac Railroad, all of which railroads, however, have declared their approval of the plan of the Buying Group of Railroads (R. 2401, 2400, 2395, 2398). These railroads in the aggregate engage in .52 percent of the sleeping car business of the country;

(3) Chicago, Indianapolis & Louisville Railway, which refrained from declaring itself because it was in trus-

Many railroads are included that individually perform approximately the same volume of sleeping car business as does the Chesapeake & Ohio group, and many others are included that perform even less volume of sleeping car business. The Chesapeake & Ohio group, consisting of the Pere Marquette and Nickel Plate in addition to the Chesapeake & Ohio, performs approximately 1.34 per cent of the sleeping car business (R. 803-4). Such roads as the Illinois Central (1.7%), Northern Pacific (1.25%) and Great Northern (1.22%) perform approximately the same or slightly less, and they have joined the Railroad Buying Group.

Moreover, such roads as the Wabash (.66%), Florida East Coast (1.03%), Delaware, Lackawanna & Western (.35%), Delaware & Hudson (.30%), Chicago Great Western (.10%), Maine Central (.16%), Reading (.04%) and Kansas City Southern (.04%) as well as many others (R. 803-4) that have considerably less sleeping car business than the Chesapeake & Ohio group, have joined the Railroad Buying Group and are here urging that the order of the court below be sustained. The small roads obviously have no fear that they will be discriminated against or that their interests will be neglected.

Six railroads, namely, the Pennsylvania, New York Central, Southern Pacific, Union Pacific, Santa Fe and Southern will own the majority of the stock since they must, of necessity, make the largest financial contribution. The Government argues that these railroads will combine and discriminate against the smaller roads. This argument ignores completely the contractual and legal obligations resting upon the railroad vendees, and, contrary to elementary presumption, imputes bad faith to them. As Mr. Justice Cardozo said in *West Ohio Gas Co.* v. *Public Utilities Comm. of Ohio*,

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teeship (R. 2396-7). It operates .14 percent of the nation's sleeping car business.

(The foregoing percentages of sleeping car business are measured in terms of proportions of gross sleeping car earnings (R. 803, 804).

294 U. S. 63, 72, "Good faith is to be presumed on the part of the managers of a business." The argument implies further that the court below either cannot or will not enforce the highly restrictive judgment agreed to by Government counsel.

The natural rivalries that exist in the railroad business between the large railroads serving the same region are sufficient to prevent them from joining together in the management of a commonly owned sleeping car company to the prejudice of the smaller railroads. There is a natural rivalry, for instance, between the Pennsylvania, New York Central and Baltimore & Ohio in the east, and between the Santa Fe, Southern Pacific and Union Pacific in the west. There is no logical reason why these railroads, which are in active competition, should join together against the smaller railroads, nor are there any economic considerations to motivate them to do so.

The smaller railroads are, generally speaking, auxiliary to, rather than competitive with, the large railroads since they do not have mileage enough of their own for overnight journeys and therefore enter into arrangements for joint through-line sleeping car service with one or more of the larger railroads. The comprehensive timetables of each of the six lines alleged to be dominant show innumerable instances of joint through-line service with the smaller lines, which constitute a large part, if not the bulk, of the sleeping car service in which the smaller lines participate. Nothing could be more unlikely than that the larger railroads would deplete their own incomes by prejudicing the through-line services which they maintain with the smaller railroads.

The operation and servicing of sleeping cars cannot, from the standpoint of competition, be viewed apart from the unitary transportation service of which it is a part. Heretofore Pullman has been employed by the railroads to assist them render a unitary transportation service by supplying cars and performing hotel or chambermaid service incident thereto. The railroads have sold the tickets, provided the

depots, tracks, train crews, schedules, locomotives and all the other things necessary to provide the complete service of transporting passengers from one point to another. The railroads have always determined the composition of their own trains, decided how many sleeping cars will be attached to a train, and which trains will carry the sleeping cars (R. 2224).

Pullman is not a competitor of the railroads, but merely a concessionaire. The judgment of the court and the agreement of the railroads, as well as the law, forbid discrimination against smaller lines, and the inter-line and cooperative nature of the sleeping car activity constitutes abundant economic sanction that there will be no discrimination in fact.

The lower court heard all of the objections that have been raised and met them by the provisions of the order under attack, and warned that the parties would have to play fair one with the other, and—

> "* * * if any one of the partners in the cooperative enterprise starts to play fast and loose with one of its associates, this Court is open to a suitor who claims that our decree is not being complied with." (R. 1199)

In short, there is no likelihood, opportunity, motive or power under which the six larger railroads, or any other group, will do what the Government claims they have the power to do. On the contrary, they will abide by the judgment of the court and faithfully perform their contractual obligations. If, perchance, they do not do so, there is every assurance that the court will perform its duty in the premises.

4. The Contention That the Plan Requires the Railroads to Lease All of Their Sleeping Cars to Pullman During the Interim Period and That All Railroads Are Thus Compelled to do Business With Pullman to the Exclusion of Everyone Else is Legally and Factually Wrong.

Appellants lay stress upon the operation of the railroad plan during the interim period expiring not later than December 31, 1948. The allegation is that since the plan requires the railroads to lease their sleeping cars to Pullman during the interim period, all railroads are compelled to do business with Pullman and everyone else is excluded from the sleeping car business.

The leasing back of cars is provided for in Article VI of the Memorandum Agreement (R. 1165) entered into between members of the Buying Group in October, 1945, as a necessary step in their acceptance of Pullman's offer to sell to a Railroad Buying Group (R. 2246). It is there provided that all lightweight cars acquired or owned during the period, together with all heavyweight cars acquired from Pullman, are to be leased back to Pullman for a period to expire at the end of the interim period "or earlier, if so agreed by the parties."

The quoted qualification is important because the railroads have, as contemplated by it, already taken cognizance of the termination of the war and demobilization emergency which made the exclusive leasing provision necessary in October, 1945 (R. 1198). The proposed operating agreement, which has already been submitted to and is now before the Interstate Commerce Commission, provides:

> "Pullman shall lease for the purpose of operation and servicing on the lines of the Railroad such new-type lightweight sleeping cars or present-type standard sleeping cars or tourist cars owned (or held under lease) by the Railroad as the Railroad may elect, * * *." (*infra* App. pp. 30-31)

This provision gives the railroad, not Pullman, the election to lease. The Government's contention that all railroads are compelled to lease their cars to Pullman during the interim period no longer has factual foundation.

The interim period was proposed in October, 1945, in the Memorandum Agreement between the railroads constituting the Buying Group and was filed with the court as Exhibit D to the intervention petition of the railroads (R. 1141, 1161). V-J day was only two months past; the great work of demobilization, which required the use of a large part of the Pullman fleet for military purposes, was just getting under way and no one could tell how long it would take. The Army had expressed concern over possible disruption of Pullman operations (R. 2016); the war emergency had not passed and the peacetime economy was not yet restored.

Under these circumstances a period expiring not later than December 31, 1948, was not too long to accomplish what had to be done in the way of making plans and acquiring new facilities before the railroads could make a permanent setup for the sleeping car business.

The court below had a practical and not a theoretical situation to deal with. The Pullman business could not be sold as so much merchandise or property; there was an imperative necessity of continuing to operate the sleeping car business from day to day without interruption. Pullman owned most of the cars and serviced all of the cars used in through-line sleeping car service. Moreover, Pullman owned substantially all of the spare parts, repair shops, laundries, linens and bedding necessary for the operation of sleeping car service and had on its payroll the only trained and qualified employees who could render the service.

The arrangements approved by the court had to be flexible enough to make Pullman's facilities and employees available to the railroads as a whole until such time as the railroads could make their plans to take over operations and, to the extent desired, provide their own equipment and

facilities. All parties recognized that Pullman would have to continue in business for a time regardless of what new organization took over. The court so understood when it approved the rail plan (R. 1198).

5. The Railroad Plan Provides for the Maintenance of an adequate Pool of Sleeping Cars.

The existing fleet of Pullman sleeping cars consists of cars that are regularly assigned to particular railroads and particular "through" sleeping car lines as well as a considerable number (generally called "the pool") of unassigned cars that are available for shifting from railroad to railroad to provide for the fluctuating demands of traffic. The practical need for this car pool was urged in the court below as a reason for such unified operation of the sleeping car business as has been conducted by the Pullman Company. The necessity, in the public interest, that this car pool be preserved was recognized by the trial court and was conceded by the Government.

Appellants argue that the railroad plan will destroy this pool, but they can reach this conclusion only by ignoring the plain provisions of the agreement among the Buying Group of Railroads which sets forth the plan of future sleeping car operation.

That agreement provides expressly that the Pullman Company, under railroad ownership, shall retain in its ownership all "unassigned" cars or so many of that number as are necessary for the maintenance of the migratory pool of cars. And the agreement of the buying railroads does not limit their mutual obligation in this regard to the so-called interim period which is to terminate not later than December 31, 1948. The covenant is for continued and indefinite performance thereafter when the Pullman Company will have been reduced to a sleeping car servicing company (R. 1164, 1184).

All of this is expressly provided for by a variety of interrelated clauses which converge to the same objective.

For instance, the Memorandum Agreement of the Buying Group of Railroads recites as the first of the purposes of the plan the maintenance without interruption of orderly sleeping car service requisite in the interest of the public and for the military establishment in the existing emergency (R. 1163). It also recites, among these purposes, that the Pullman Company while under railroad ownership, and the service company which is to succeed it, shall afford to every railroad which desires it, sleeping car service or maintenance, or sleeping car service and maintenance, on reasonable and non-discriminatory terms (R. 1164).

To carry out these and the other specified purposes of the program of the Buying Group of Railroads the agreement contains specific provisions for the mutual availability of the entire existing pool during the interim period ending not later than December 31, 1948 (R. 1165); and the agreement contains express declaration that the Pullman Company, under railroad ownership, shall sell "unassigned" cars only to the extent that that may be done without impairment of an adequate floating pool (R. 1166). To the end that all possible question might be disposed of, the Buying Group of Railroads in their supplementary agreement of November 20, 1945, specifically agreed that in the performance of the obligation to maintain this car pool the projected sleeping car servicing company shall be obligated, to the extent required for that purpose, to acquire additional sleeping cars (R. 1184).

From these, as well as from other provisions of the railroad agreement, to say nothing of the all-pervading intent of their contractual undertaking, it thus appears that the railroads recognize their common obligation to preserve the sleeping car pool, and have adequately and effectively provided for it.

The appellants' misapprehension with respect to the car pool is not confined, as above indicated, to the factual considerations; it would appear that the appellants equally misapprehend the applicable legal relationships that have relevancy to the subject.

The court below having found an illegal monopoly proceeded to dissolve it. In the performance of this remedial process it encountered a mutual or common operation which could be broken up only at the expense of or detriment to good public service. Accordingly, it tempered its remedy of dissolution by providing that this mutual or joint operation need not be disturbed.

The primary and affirmative obligation, however, to render this joint service was and continues to be that of the railroad companies upon whom rest the franchise obligations to render adequate service. In these circumstances the court looks to the railroads to effectuate the public service obligation which the law imposes on them. The court was facilitated in the performance of its duty, to dissolve the monopoly that it found, and yet not destroy that factor whose continuance was required by the public interest, when the railroads, which had not theretofore been parties to the antitrust litigation, intervened and expressly and effectively implemented their public service obligations by written contract.

III.

THE ORDER UNDER REVIEW PROVIDES COMPLETE AND EFFECTIVE SEPARATION BETWEEN THE PULLMAN CAR MANUFACTURING COMPANY, ON THE ONE HAND, AND THE RAILROADS AND THE RAILROAD OWNED SLEEPING CAR COMPANY, ON THE OTHER.

Appellants charge that sale of the Pullman Company to the railroads will not bring about the separation of the car manufacturing business from the sleeping car servicing business contemplated in the final judgment. The Government contends in Part II of its brief that the rail plan would vest in the commonly owned operating and servicing company the inherent power to control the market in the manufacture and sale of sleeping cars. Similar arguments are made at great length in the briefs of the appellants, Otis & Company and Chesapeake & Ohio Railway Company.

Nothing is offered by any of the parties in support of these arguments other than unfair and baseless conjectures as to what the railroads might do if they dared to violate the court's decree and otherwise behave in a manner inimical to their own interests. The Government suggests, for instance, that the rails "might very well feel a deep obligation to favor Pullman-Standard in placing orders for cars" (p. 42, Government's brief); that "if" the new company should decide not to purchase any cars and "if" it refuses to expand, "then the competitive bidding requirement would be useless" (*ibid*, p. 43); that competitive bidding could be "sidestepped neatly" by control of specifications by Pullman so that only one manufacturer would bid (*ibid*, p. 43); that the decree would be flouted because "there is no formula under which a court can regulate the quality of service to be rendered", and neither is there any formula which a court could apply to prevent the railroads "from providing a quality of service which is tantamount to refusal to serve" (*ibid*, p. 44). The mere statement of

such propositions is sufficient to discredit them. There is no excuse for the suggestion that the railroads will not obey the orders of the court and conform to their commitments to each other, or that the court below will fail in its duty if they do not do so.

The restrictive provisions of the final judgment, which are outlined herein, page 30, were made directly applicable to all railroads in the Buying Group as purchasers of Pullman stock by paragraph 3 of the court's decree approving the sale of the stock to the railroads (R. 1204). Paragraph 5 of the decree provides that consummation of the sale of the Pullman stock to the railroads must be approved by the court, at which time evidence must be submitted to the court that no such interlocking directorates continue to exist as are disapproved by the court.

Appellant, Otis & Company in its brief (pp. 62-67) represents that five individuals who are directors of Pullman companies, namely, Messrs. George Whitney, Harold S. Vanderbilt, Henry S. Sturgis, John R. Morron and Richard K. Mellon, are also directors of certain railroads. The facts, however, are to the contrary, since Messrs. Vanderbilt, Whitney and Sturgis have resigned as directors of Pullman companies, Mr. Morron has resigned from his railroad directorship, and Mr. Mellon at the time of the argument in the court below was prepared to resign as a director of Pullman companies (R. 2504). Mr. Mellon has since taken such action. Therefore, there are no interlocking directorships as between Pullman companies and the railroads, and paragraph 5 of the order assures compliance with all the conditions of the court's approval of the sale, including the requirement for a complete divorcement of the manufacturing business from the sleeping car business.

The final judgment specified the conditions deemed adequate to effectuate the complete separation of the manufacturing business from the sleeping car business. These conditions include the complete and perpetual separation of the ownership or control of the two businesses and pro-

hibit any corporation owning or controlling either business, or the directors, officers, agents or employees of either of them, as well as any other persons having notice of the judgment, to attempt by stock holdings, proxy holdings, fictitious holdings, assignments, transfers of stock, or by any other means "to evade, impair, or destroy the effectiveness of the separation specified in paragraph 7." (R. 766)

The final judgment of May 8, 1944, proceeds in painstaking detail to spell out the comprehensive respects in which the separation of the two businesses is implemented and assured (R. 766-769). The Government did not appeal from that decree; thus it accepted the provisions and conditions thereof as adequate to effectuate the complete separation of the two businesses. Indeed, in these respects, apparently the judgment is in the form composed and submitted by the Government (R. 760).

The broad contemplation of the agreement of the Buying Group of Railroads is that each railroad on whose lines lightweight sleeping cars have been operating shall exercise its contractual right to purchase said cars and that all railroads shall have the right to purchase their regularly assigned standard and tourist sleeping cars. This will leave in Pullman ownership the fleet of unassigned cars which constitute the migratory fleet whose units are shifted from road to road to meet the fluctuating demands of traffic. The agreement provides for the permanent maintenance by the Pullman Company under railroad ownership, as well as by the successor servicing company, of this necessary pool of sleeping cars.

In these circumstances, the several railroads (and in the case of "through" sleeping car lines, the participating connecting carriers) will become the principal buyers of new sleeping cars. This will produce a large number of car buyers and bring about competition in the design, type and style of new sleeping cars which would not eventuate under the plan of a so-called outside independent owner of the sleeping car business such as Otis & Company. Purchases

by the railroad-owned Pullman Company and by its servicing company successor will be of such cars as are necessary to maintain the pool. The obvious probabilities, in the direction of the regular and most intensive use of the newest equipment, are that the pool will largely be made up of cars that are replaced on the several lines by new cars, although the agreement of the railroads includes also provision for the purchase by the sleeping car company of additional cars if needed for maintenance of the pool (R. 1184).

The important point is that the complete separation of the Pullman car manufacturing business from the sleeping car business and from the vendee railroads is provided by the order and the effectiveness of the separation is buttressed by the requirement that all car purchases be by competitive bidding conducted in the manner prescribed by the Interstate Commerce Commission for competitive bidding under Section 10 of the Clayton Act (15 U. S. C. § 20).

It is an unsupported, unworthy and gratuitious suggestion of the Department of Justice that this competitive bidding requirement "may be sidestepped neatly by the control by Pullman of specifications with respect to style, type and design of cars in such a way as to enable only a particular manufacturer to bid." (Government brief, pp. 22, 43). The record is barren of any evidence upon which to predicate the probability of any such lawlessness. As a very practical matter, the wholesome rivalries among car builders may be depended upon to see to it that any evasion or violation of the order of the court below will be brought to bar, and that court should be trusted to enforce its orders.

In view of all the restrictions resting upon the railroads as purchasers of Pullman Company stock, it is incredible that the Government should claim that the new Pullman Company would be—

> "* * * in a position to dictate the type, style, and design, the number of cars to be operated, the roads and routes over which such cars are to be operated, as

> well as the manufacturer from which such new cars are to be purchased, through the simple device of refusing to operate and service any cars except those designated by it." (p. 40, Government brief)

The railroads always had the right, even under the Pullman monopoly, to determine the number of cars to be operated and the roads and routes over which they would be operated. At the hearing, neither the Department of Justice nor anyone else, disputed the following testimony of the president of one of the railroads:

> "The railroad company, rather than the Pullman Company makes the time schedules and hauls the sleeping cars. The determination of the consist of trains, the number and character of sleeping cars on trains, the speed of trains, the times of arrival and departure and all such other elements, must necessarily be determined as between the Pullman Company and the railroad company by the latter." (R. 2224)

In these circumstances, it is abundantly evident that the railroad plan, by fully satisfying the requirements of the final judgment and the order of approval, will effectually assure the complete separation of the manufacturing and sleeping car businesses.

IV.

THE GOVERNMENT'S ENDORSEMENT OF THE SO-CALLED "INDEPENDENT" BID IS UNJUSTIFIED.

1. The Otis Bid is Financially Unsound. The Public is Expected to Furnish Most of the Money and the Railroads Will Have to Underwrite All of It.

The Government, after urging that the railroad plan would create monopoly during the interim period, declares that if Pullman were sold to a "truly independent concern" there might be at that time no violation of the Sherman Act, and then propounds the following rhetorical question:

> "But if this is all the plan is intended to accomplish, then why the interim period? Why not a sale now to a truly independent purchaser? Why not a sale now to an actual purchaser with money in hand whom the District Court knows to be independent, rather than a long wait for a hypothetical purchaser to be created by the interested railroads?" (Govt. Br. 37)

While the Government repeatedly declares (Br. 25, 38, 55) that there were two "independent purchasers" before the District Court, obviously its language quoted above refers only to Otis & Company, because only Otis & Company even claimed to appear "with money in hand".

Glore, Forgan carefully avoided it by attaching to its bid at least two very significant conditions. First: Its bid was to be effective only if a number of railroads satisfactory to Glore, Forgan committed themselves by contract in form satisfactory to Glore, Forgan, providing periods and payments satisfactory to Glore, Forgan (R. 1060, 2104)—this with not the slightest assurance to the railroads as to who would manage the business after its sale to the public. Second: It could withdraw its bid, without liability, if fifty percent of the underwriters of Glore, Forgan decided market conditions made it inadvisable to try to sell the stock to the public (R. 1062).

The Government's rhetorical question—why the interim period, why not a sale now to a truly independent purchaser—therefore requires consideration of the Otis bid alone.[11]

When the District Court entered its judgment of May 8, 1944 (R. 764) the nation was at war. Nearly half of the 7,000 sleeping cars of the country were engaged in moving troops, and two-thirds of the military passenger traffic in the United States was being carried in Pullman sleeping cars, a fact which aroused the interest of the War Department itself (R. 2016). That emergency was still in existence when the District Court approved the sale to the railroads January 4, 1946. These facts are so conspicuously a part of current history that they speak for themselves, and no one in this case has failed to recognize—unless the Government's rhetorical question be given that implication—the resulting necessity that orderly and unified sleeping car service be not disturbed during the post-war emergency. The trial court stated it thus:

> "The proposal is that for the present all sleeping cars, whether bought by individual roads or not, shall be in the general pool. This is imperative, since the armed forces need the service, and the emergency is not yet passed. Then it is proposed, after a period not to exceed three years, to set up or find a service concern which shall own the reserve pool of cars and furnish operating service to the roads which wish it." (R. 1198-9)

"Why not a sale now to an actual purchaser with money in hand" (meaning Otis)? Pullman owns nearly all the sleeping cars in the United States (R. 735, 754). The entire manufacturing capacity of the nation is only four sleeping cars per day (R. 2063-4; Otis Br. 40). The railroads themselves were ordering hundreds of cars (R. 2531, 2546-2547;

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[11] Reference to bid of Standard Steel Spring is unnecessary. It has not appealed, its bid expired through time limitation on its banking arrangements (R. 2609), and it is not discussed by any appellant.

Otis Br. 15). Had there been such "a sale now" Otis would have faced the same emergency and would have had to meet it in the same way, with the same existing 7,000 sleeping cars.

The question, why not a sale now to Otis, must, therefore, be dissociated from the interim period and answered in the light of the proposal that Otis be established *permanently* in the ownership, control and management of the sleeping car business of the United States. A proposal so far-reaching requires close scrutiny.

Otis & Company is a corporation. Its combined capital and surplus is $1,500,000. "In addition to that, we have the capital of the four of us, which, of course, runs many mililons." (R. 2045) Witness Daley, President of Otis & Company, was asked whether Otis & Company is "an engineering concern or a business management concern or an investment banking concern" and he answered, "An investment banking concern, but we have been associated with a great many enterprises * * * through the sale of their securities and investment in their securities by individuals." (R. 2051)

It is this investment banking concern which makes and signs the Otis proposal. It recites its association with Robert R. Young and Allan P. Kirby (R. 993), who control the Chesapeake & Ohio, the Nickel Plate and the Pere Marquette railroads. The proposal requires actual net investment of either $20,000,000 or $40,000,000 as purchase price of the stock, depending on plan actually followed (R. 2083), but there is a singular lack of understanding among the proponents. President Daley testified:

> "Q. You stated a moment ago that you could not divide your interest. Does that mean that you have made no division of your financial responsibilities in this transaction by agreement among yourselves? A. That is correct.
>
> "Q. So it is not possible for you to state at this time how much of the $19,776,000 you will put into the enter-

prise, how much Mr. Kirby, or how much Mr. Eaton, or how much Mr. Young? A. That is right." (R. 2044)

This astonishing lack of actual commitment among co-adventurers intending to invest nearly $20,000,000 or possibly $40,000,000, is a fitting background for their proposed handling of the sleeping car business if they succeed in getting control of it.

The Otis petition declares itself to be—

> "an outline of its proposal, its qualifications to carry it out, and a description of the modern service for the railroads to which it stands committed if its proposal is approved." (R. 984)

It then states that Pullman Company sleeping car service invites thorough revision:

> "Its heavyweight cars are obsolete. They must be completely replaced with modern lightweight equipment. This will cost in excess of $500,000,000." (R. 985)
>
> "The court must find men willing and able to take the financial risk of creating new demands, expanding undeveloped markets, and replacing old equipment with the constantly changing designs necessary for the coming age of travel.
>
> "Judged by these standards, your petitioner represents perhaps the group in this country best qualified to introduce competitive ideas in the sleeping car transportation business. Financially it is strong enough to carry out any undertaking to which it commits itself." (R. 992)

Counsel for Otis & Company said in argument:

> "If they are rosy hopes, if the Otis-Young group build a lot of cars and go bankrupt, where are the railroads hurt?" (R. 2417)
>
> "Can you imagine a more suicidal policy with a group that is expanding (expending) $500,000,000 than, during this little interim where they have got 7,000 obso-

lete cars, trying to drive their own customers for the new equipment away from them and trying to force their own customers into furnishing their own equipment." (R. 2418)

All this sounds as though the Otis group intends to risk $500,000,000, and as though it will be the Otis group that will suffer if the risk proves improvident. This is not the case, in either particular.

As stated by Judge Maris, this is not to be a banking risk but a public risk (R. 2427). The public is expected to furnish $450,000,000.

"Q. Of course, Otis & Company does not have $500,000,000 to put into this enterprise? It must be by public financing through, probably, equipment trust certificates, as you have indicated? * * * A. I think that is a fair statement." (Daley, R. 2046)

"Q. * * * Suppose you need $500,000,000, a half billion dollars for these cars; how much cash would The Pullman Company have to have in order to obtain that much money for this equipment? A. Fifty million dollars.

* * * * * *

"Q. What is the life of that loan? A. The life of the equipment, seven to ten years.

"Q. You are going to repay principal at the rate of one-tenth of it each year? A. That is correct." (Young, R. 2073)

The reaction of the lower court to this feature of the Otis-Young proposal and the effort of Government counsel to support it is disclosed by the record as follows:

"Judge Biggs. Let me interrupt again. The Young-Otis offer does include financing, public financing, to the extent at least of four hundred million dollars, does it not?

"Mr. Baldridge. That is correct.

"Judge Biggs. Now, suppose that blows up—as has happened with financial plans in the past. The public

would be out that amount, or something very close to it, and would be out, in effect, out-of-pocket that amount under a plan which in effect, if not in substance, would bear the imprimatur of this court so far as approval went. Should not the Court rather be on the conservative side in respect to public money which might be offered under the Otis-Young plan?

"Mr. Baldridge. The public is protected in the issuance of stock and other securities by the provisions of the Securities and Exchange Act. I don't think it is the duty of this Court—

"Judge Biggs. How would that protect them? I must say—would you explain that a little bit, now?

"Mr. Baldridge. Well, assuming—

"Judge Biggs. Can't you lose money on an issue registered with the S.E.C. as well as you can on any other issue?

"Mr. Baldridge. Certainly, but there is no court or no commission that can guarantee a return on a stock or bond investment in any enterprise.

"Judge Biggs. Quite true, but, then, what does the S.E.C. have to do with it?

"Mr. Baldridge. Well, certainly, if stock is registered with the S. E. C. the public has protection as to certain characteristics of the enterprise which the stock supports.

"Judge Maris. Well, there wouldn't be anything that could be disclosed other than what we have heard, could there? Is there anything back in this proposal that we don't know about that would be disclosed under a registration with the Securities and Exchange Commission?

"Mr. Baldridge. Well, I am not in a position to discuss that with the Court, because I don't know—" (R. 2559-2560)

The public is to furnish this $450,000,000, but the railroads must underwrite the whole enterprise, because there is no other source of support, and because—with Otis controlling the laundries, repair shops, materials and supplies,

more than three-fourths of the sleeping cars (R. 2391), and the entire sleeping car personnel—the railroads would have to support it.

> "Q. Of course you expect, do you not, to make a reasonable return on the money that you put into this enterprise? A. Yes, sir.
>
> "Q. Where is that money going to come from, Mr. Daley? A. The money is going to come from the business of operating sleeping car equipment on the railroads of the country and the profits have got to come from the fact that we can provide such equipment and such service on the equipment as will bring the public to the use of it." (R. 2051)

The burden which this would impose upon the railroads is extremely significant. Witness Anderson, formerly Vice-Chairman of the War Production Board, after study and financial analysis of Pullman Company (R. 2154) testified that retirement of cars as proposed by Otis would increase Pullman's operating cost by $40,000,000 a year, and that for the year 1944, the top profit year in Pullman history, this would have completely wiped out all railroad earnings from sleeping car operation (R. 2157).

The remedy promised by Otis is enlargement of Pullman patronage by improvement of equipment and, especially by advertising. The average capacity of Pullman cars was about thirty but their average load was only twenty-one during the war period when there was demand for all available space (R. 2160), due largely, one may assume, to the fact that sleeping cars must serve patrons between intermediate stations as well as from one end of the line to the other, and sleeping car space necessarily must move without occupancy when held under assignment for intermediate stations. Retirement of 7,000 existing cars and substitution of 7,000 new ones promises very little increase in capacity and therefore very little increase in patronage over that of a period when the entire capacity was in demand.

Otis' great reliance is upon advertising. The record is replete with this, but a single quotation will suffice:

> "It is my belief that the overnight passenger business *that existed before the war* would have been two or three times what it was if the railroads had shown the same imagination and aggressiveness that Pepsi-Cola, Chrysler or Camels show in their merchandising." (Young, R. 2066, emphasis supplied)

The average load factor of 30 capacity sleeping cars for the years 1936 to 1940 was between ten and eleven (R. 2156). Doubling it, as suggested by Mr. Young, would increase it to 22, about the 1944 figure, which Mr. Anderson declared, without contradiction, to be "about as high as it can be expected that the loading would ever go." (R. 2156).

This is the Otis proposal as to which the railroads would have to contract for support of the public investment of $450,000,000 and for production of Otis' expected profit. The railroads would have no choice, as heretofore shown. All protestations to the contrary notwithstanding, Mr. Young unintentionally dropped for one moment the veil of concealment of the coercion inherent in the Otis proposal:

> "Q. Yes. If the railroads didn't come in, if the railroads decided to compete with you by having their own cars and their own service, I didn't quite understand you when you said that that would put you in a position to build and use more cars. A. It would if we had the *exclusive right to operate over the railroads of the country.*" (R. 2078, emphasis supplied)

True, Mr. Young "elaborated" by basing his hope on "process of merit" instead of "process of monopoly" (R. 2079), but he *disclosed the hope*—exclusive right to operate—and, if he prevails here, he will be in position to realize it in very large measure, whether the railroads like it or not. The "process of merit" will be unnecessary if the railroads must either contract with him or suspend a substantial part

of their sleeping car operation. The fact that practically all the railroads of the United States, except those controlled by Mr. Young, signify in this case their adherence to the railroad plan discloses that if they contract with the Otis-Young group it will be the result of compulsion and not "process of merit".

2. The Otis Proposal Would Itself Create Monopoly in Violation of the Sherman Act and Would Defeat the Intent of the Lower Court to Protect the Right of Railroads to Conduct Their Own Sleeping Car Operations.

The Government (Br. 40) asserts that the Pullman Company under railroad ownership could by evasion dictate style, design, number, routes and manufacturers of cars, and we have shown (*supra*, pp. 48-49) that this assertion is not sound. Surprisingly enough, the Government entertains no such fear in respect of the Otis-Young group. At the trial it approved as "attractive features" the frank intent of that group to exercise actual control over style, design and number of cars, and opportunity of that group to control selection of car builders.

> "We think that the most attractive feature of the (Otis) offer lies in the confidence of its sponsors in the future of the sleeping-car business, as evidenced by their willingness to spend half a billion dollars to modernize the fleet and their promise to renew the fleet every ten years." (R. 2557)

There can be no question but that the Otis plan proposes that it shall be the only purchaser of sleeping cars in the United States. Mr. Young speaks of "large orders" and declares that "they will never be forthcoming except from a national pool, aggressively managed, which intends to replace the entire fleet" (R. 2064).

At page 2066 Mr. Young declares intention to replace the fleet "as rapidly as manufacturers can fill our orders" and to "place orders for thousands of cars, not small lots of

seven or ten or a hundred." (A "small lot" of 100 would cost at least $7,000,000).

Nothing is urged more strongly by the Otis-Young group than its intention to spend $500,000,000 on sleeping cars every ten years. Its brief declares intention to "replace the entire fleet" (Br. 7) and to place immediate orders for sleeping car equipment to replace the entire fleet in an amount estimated at $500,000,000 (Br. 8).

Its proposal (R. 996) boasts, and its brief (Br. 9) repeats the boast, that it "will have the advantage of mass buying power of large orders from competing manufacturers", completely disregarding the fact that monopoly of purchase violates the Sherman Act as much as monopoly of sale, and the fact that Pullman was never in stronger position than Otis-Young would be to select the manufacturers with whom it would deal. So far as concerns power to dictate styles and designs of cars, Otis-Young did not hesitate to declare its purpose to "standardize" them (R. 998, 2078).

This last is subject only to the limitation that under the court's judgment Otis-Young would have to buy sleeping cars through competitive bidding. That is a limitation which the Government, out of the whole cloth, supposes that the railroads would evade "through the simple device of refusing to operate and service any cars except those designated by it." (Govt. Br. 40), which means through the device of outright and direct disobedience of the court's order and breach of express contract.

If the court's order is so easily escapable by the Pullman Company under railroad ownership when the individual railroads and not the Pullman Company are buying the cars, evasion would be much easier for Otis-Young if the Pullman Company under its ownership is the only purchaser.

The monopolistic power of Otis-Young would not be confined to selection of car builders however. It would extend to the even more important feature of dictation to the railroads. It has been pointed out that the Otis-Young group

would be in such position that the railroads would have no choice but to enter into operating contracts with it. In this connection it is to be noted that it would be under no obligation to furnish cars or render service to any railroad under the court's order unless the railroad enters into a contract for such cars or service (R. 770). The railroads could not wait for the "process of merit"; that would mean the temporary suspension of their sleeping car service. They would have to contract with Otis-Young under the "process of monopoly."

Thus it is clear that Otis-Young proposes to fall heir to the monopoly of the Pullman Company under its former ownership in respect of both manufacture and operation. This violates not only the Sherman Act, but also the express purpose of the lower court to provide freedom for every railroad in the conduct of its sleeping car business, and to afford car builders opportunity to compete.

There is another important respect in which Otis-Young would enjoy monopolistic power. It is disclosed by the record and it speaks for itself.

> "Q. If you had this tremendous operation that called for the purchase by a single buyer of all of these cars and could swing those orders around from one car builder to another car builder, that would put you in a position of considerable economic power, would it not? A. It would, indeed, for the benefit of all the people in the country." (R. 2079)

Undoubtedly Pullman under its former ownership was just as much disposed to protest as is the Otis-Young group that its dominant position would be used "for the benefit of all the people". But the mere intention, even if sincere, to exercise monopolistic control benevolently is no excuse for its existence. As the court below pointed out in this case, "Benevolent monopoly is no less a monopoly because it is benevolent." (R. 741).

To rectify the dominant position resulting from the great purchasing power which the Otis proposal would give the

Chesapeake & Ohio group in all traffic competition, the Government could suggest no expedient other than that the Court should undertake to limit the amount of both freight and passengers that the Chesapeake & Ohio, Nickel Plate, and Pere Marquette shall be permitted to carry (R. 2559).

The Otis-Young proposal would put the Chesapeake & Ohio group in control of all sleeping car business conducted on all railroads of the United States (R. 2068); but apparently the Government finds in that nothing that looks like monopoly. The Chesapeake & Ohio has not a single assigned modern lightweight sleeping car in operation on its line; neither has the Pere Marquette; the Nickel Plate has only two (R. 2391). Combined they do but 1.34 percent of the sleeping car business of the Nation (R. 803-804). Notwithstanding these facts, the Government thinks that the judgment of the Chesapeake & Ohio group and their bankers should outweigh the judgment of the other railroads as to how their sleeping car business should be conducted.

The Otis scheme is fantastic, as well as monopolistic, and should not be imposed upon the railroads.

CONCLUSION.

For the reasons herein stated, it is respectfully submitted that the order under review should be affirmed.

Respectfully submitted,

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